Supreme Court, U.S.
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No. 00-1792

In The

Supreme Court of the United States

RICHARD MUZZI,

Petitioner,

v.

CIMARRON SOFTWARE SERVICES, INC. and DYNMCDERMOTT PETROLEUM OPERATIONS COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion of the Court of Appeals for the Fifth Circuit, Docket No. 00-31224, which summarily affirmed the Judgment of United States District Court Judge A.J. McNamara, Docket No. 99-2795. The Opinion of the Court of Appeals for the Fifth Circuit is reproduced in the Appendix of the Petition and is herein referred to as the Court of Appeals' Opinion or Decision. The Opinion of the Judgment of the District Court Judge is also reproduced in the Petition's Appendix and is herein referred to as the District Court's Opinion or Decision.

STATEMENT OF JURISDICTION

This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1254(1) or Supreme Court Rule 10(a) or (c) because there is neither an important federal question involved, nor does the Court of Appeals' Opinion or that of the District Court conflict with any decision of this Court. Moreover, the Petition mainly consists of alleged factual errors, which, under this Court's own Rule 10, rarely support the granting of a Petition for Writ of Certiorari.

STATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURTS BELOW

From his original complaint through his constant flow of unfounded motions (which ultimately resulted in Rule 11 sanctions against him) to his current Petition before this Court, the Petitioner, Richard Muzzi, has besieged this Court; the Court of Appeals for the Fifth Circuit; the District Court; Cimarron Software Services, Inc. ("Cimarron"); DynMcDermott Petroleum Operations Company ("DynMcDermott"); and the EEOC with frivolous claims, not one of which has validity in fact or in law.

The Petitioner's claims were rooted in allegations of disability discrimination and unlawful retaliation under the ADA. Seeking what amounted only to an apology, the Petitioner sued Cimarron, DynMcDermott, and even the EEOC itself (though the EEOC was soon dismissed by the District Court). Cimarron and DynMcDermott filed a Motion for Summary Judgment on September 5, 2000.

The District Court granted their Motion for Summary Judgment on September 26, 2000 because there were no genuine issues of material fact to support the Petitioner's claims and because Cimarron and DynMcDermott had legitimate, non-discriminatory reasons for their actions. Even after the District Court had entered its judgment, however, the Petitioner continued to file improper motions in that Court, resulting in the imposition of sanctions against him. On March 13, 2001, the Court of

Appeals for the Fifth Circuit affirmed the District Court. This Petition followed.

II.

STATEMENT OF THE FACTS

Cimarron, an information systems provider and a Respondent herein, extended to the Petitioner, Richard Muzzi, a salary offer in a letter dated January 23, 1998. The Petitioner accepted and was hired by Wendell Jay Rose ("Jay Rose") on January 28, 1998 as an applications systems analyst. Jay Rose was the Petitioner's supervisor and the project manager for Cimarron. The Petitioner was an at-will employee, as was clearly spelled out in the January 23, 1998 letter.

For eight years, Cimarron was the subcontractor to DynMcDermott, another Respondent. DynMcDermott, the prime contractor, is a perennial servicer of the United States government and the Department of Energy ("DOE"). DynMcDermott has been responsible for managing the Strategic Petroleum Reserve ("SPR") for the DOE, and Cimarron augmented DynMcDermott's workforce and provided information services.

The SPR is a project of strategic and economic importance to the United States because it stores 600 million barrels of crude oil for the United States government under the auspices of the DOE and thus could be subject to foreign and domestic espionage or sabotage. As a result of these possibilities, security and safety are primary concerns at the SPR.

The Petitioner's performance and attendance at work were satisfactory for several months; in fact, his performance merited him an award. However, in late September and into October of 1998, he began to be absent from work excessively. Each week, he was working far fewer than 40 hours, though the Petitioner never explained the reasons for his absences.

It was later learned that he was hospitalized in late October of 1998. The Petitioner did not notify his supervisor, Jay Rose, or anyone else from Cimarron or DynMcDermott regarding the reasons for the hospitalization, which caused him to miss several more days of work. Although the Petitioner eventually did tell Jay Rose that he was hospitalized, he nevertheless admitted under oath that he provided no details of any problems at any time:

> Q. Did you tell [Jay Rose] why you were in the hospital?
>
> A. I don't recall. I don't think I did. I told him that I was in the hospital and I had to stay there, but I don't remember telling him exactly why I was there.

At the time, the Petitioner only told Jay Rose that he did not want to say what the problem was, but that he thought everything was now under control.

After the hospitalization, Jay Rose continued to confront the Petitioner about his overlong lunch breaks and missed days of work. When confronted, the Petitioner still refused to say why he was missing so much work. Unbeknownst to anyone, he was going to therapy during work time for alleged mental problems. However, the

appellant admitted under oath that he never told anyone, during his employment, how he was using his long lunch breaks:

> Q. But you never told anyone at Cimarron or DynMcDermott what you were using your lunch hour for?
>
> A. No. I don't believe so.

Because of his excessive absences, but also to keep him employed, Jay Rose changed the Petitioner from a salaried employee to an hourly employee in mid-November of 1998. He had become unable to work an average of 40 hours per week, never conveying any specific reasons to Cimarron or DynMcDermott for his inability to do so.

The Petitioner continued to work fewer than 40 hours per week even after his employment status was changed. Cimarron has an "open-door policy" set forth in its employee handbook, but the Petitioner never chose to exercise it – never chose to tell anyone what was going on.

On December 16, 1998, the Petitioner gave Jay Rose a letter setting forth some concerns about his employment and personal affairs. The Petitioner, however, did not make clear to his supervisor, either orally or in the letter, that he was suffering from any alleged disability. In fact, neither Jay Rose nor Cimarron was ever aware, during the Petitioner's employment, that the Petitioner was suffering from any disability whatsoever. Nor was DynMcDermott ever aware of this. Only after his employment ended did the Petitioner specifically bring to anyone's attention the notion that he had some sort of "disability."

The Petitioner admitted to the EEOC investigator that there were no witnesses to the conversation or the exchange of the letter with Jay Rose. At that time, Jay Rose made clear to the Petitioner that other than his attendance problems, he was an asset to the project and a valued employee.

The Petitioner also admitted that an alleged letter of December 14, 1998 to Jay Rose and a nonspecific hospital discharge sheet that was allegedly faxed to Cimarron were "the only ways that [he] ever communicated to anybody from DynMcDermott or Cimarron" that he was having problems. However, even if Cimarron received these two documents, which Cimarron denies, neither the letter nor the hospital discharge sheet provided any specific information that the Petitioner had a disability. Thus, neither Cimarron nor DynMcDermott ever knew the details of his problems, or that he was suffering from any alleged disability.

The very next day, December 17, 1998, the Petitioner took considerable time to author, and then send, an unsolicited e-mail message to various employees of Cimarron and DynMcDermott, and then left work early. (In fact, an e-mail of the Petitioner's sent later that same day admitted to his "distraction" from the job he was being paid to do.) The Petitioner was quick to admit that he had in fact authored and disseminated the bizarre e-mail:

> Q. And you admitted that you had, in fact, authored that e-mail and disseminated it?
>
> A. That is correct.

It was a cryptic, rambling message; an abuse of worktime; and a veiled threat to the safety and security that

are necessary for Cimarron, the SPR (DOE), and DynMcDermott. Several employees who received the e-mail expressed concern to both Cimarron and DynMcDermott about it and its troubling content.

In part, the Petitioner wrote: "for what goith to God when we die . . . would not all be free when they accept God in their Heart and Soul, a War that only the One True God can, could and would judge, Thank you Tibet, for strength such as this can only come from the one true God, for how can anything be in vain. . . . "

He went on: "for have we not killed many without knowing it by even our air and rain, remember our past. . . . "

Elsewhere, he continued: "but I remember I only have logic, I pale against ancient traditions and to nature not contest, then I tremble at even comparing me to the One True God, forgive even that slight though down that path. Perhaps God is good at riddles, I'm not. . . . "

Cimarron and DynMcDermott had little choice but to err on the side of caution and regard the e-mail message as a threat to those employees who received it and complained of feeling threatened, as well as a threat to the security and safety of the SPR. In addition, a high-ranking official within the DOE expressed concern about the e-mail message and how Cimarron and DynMcDermott would handle the matter. The SPR being vital to the United States' national security, any perceived threats are taken very seriously. The e-mail compromised Cimarron's policies regarding security and safety breaches, and the Petitioner, like every other employee, was aware of these policies. In fact, at the outset of his employment, the

Petitioner read the security policy for the SPR and signed his name to it, thereby agreeing to follow all security instructions at work.

Understandably, then, the Petitioner was removed from the project. Because there were no other projects in the New Orleans area to put him on, Jay Rose notified the Petitioner on December 21, 1998 that he was terminated because of the e-mail.

The Petitioner then filed a complaint with the EEOC for violations of the ADA, but it was dismissed as without merit. The EEOC articulated its reasons to the Petitioner as follows:

> The evidence shows that you were changed to an hourly employee before your employer learned of your disability. The evidence shows that you were changed due to your failure to consistently work an average of 40 hours per week which is a requirement to maintain salaried status. The evidence shows that you were discharged due to improper performance [E-mail sent by you to a list of people at SPR and customer's employees].

The Petitioner then filed a complaint in federal court seeking nominal damages (between $1 and $22) from Cimarron, DynMcDermott, and even the EEOC. However, at his deposition, the Petitioner asserted that he no longer sought a monetary award from the Respondents; he only wanted his personnel record purged, which really amounted to his desire for an apology.

Moreover, since March of 1999 until the present, the Petitioner has held a full-time job as an analyst with

Interactive Systems International (now known as Energy Work Space). Still, he claims a variety of impairments:

> Q. So now we've got six things that you don't do so well that most normal people do well. That is, your judgment is impaired, your memory is impaired, your ability to interact with people is impaired, your energy level for interacting with people is impaired, your attention is impaired, and your ability to control facial expressions is impaired; right?
>
> A. That's correct.

Nonetheless, other than the one "error in judgment" resulting in his discharge from Cimarron, he has neither been disciplined, nor missed one day of work, nor suffered any decrease in pay because of any alleged mental disability. Moreover, the Petitioner has offered **no specific examples** of how his impairments have cropped up and caused problems in his daily personal life, other than his allegations that he does not "have as many friends as I want" and that he is tired when he returns home after a long workday.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO CONSIDER PETITIONER'S ARGUMENTS

This Court does not review decisions of a United States Court of Appeals unless an important federal question has been decided in conflict with another United

States Court of Appeals or State Court of last resort or this Honorable Court. 28 U.S.C. § 1254(1) and S. Ct. R. 10(a), (c). *See Braxton v. United States*, 500 U.S. 344, 347 (1991). Moreover, a "petition for writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. In light of this, the Court will **only** grant review where there are "special and important reasons" to do so. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

The Petitioner, however, did not – because he could not – assert in his Petition any "compelling," "special," or "important" reason regarding why this Court should grant review of this matter. *See* S. Ct. R. 10 and *Rice*, 349 U.S. at 74. He did not – because he could not – invoke any of the grounds this Court takes into account in deciding whether to grant review. *See* S. Ct. R. 10(a), (c). Rather, the Petitioner's entire Petition mainly focused on his contention that neither the District Court nor the Fifth Circuit properly considered the *facts*. But the truly significant fact is that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings." S. Ct. R. 10.

There is no jurisdictional basis, and none has been invoked, that supports the Petitioner's writ and that therefore allows this Court to grant review. The Petitioner has not cited – nor could he cite – any important questions of federal law in this matter that are decidedly different among the Courts of Appeals, by a State Court of last resort, or any decision in conflict with precedent of this Court. The District Court and the Fifth Circuit properly decided this case, and the Petitioner's writ should be denied.

Of further concern is that his Petition – to put it mildly – lacks "accuracy, brevity, and clarity" and is riddled with "irrelevant, immaterial, [and] scandalous matter." S. Ct. R. 14(4) and 24(6). The main thrust of his troubling Petition is that this Court should intervene because the District Court Judge and the Fifth Circuit Judges all committed "perjury and contempt" by finding in favor of the Respondents. The Petitioner has likewise charged that counsel for the Respondents committed "perjury and contempt" in presenting this case below. Moreover, the Petitioner has threatened to bring suit against this Honorable Court if it "conspire[s] with the lower courts and uphold[s] contempt and perjury" and refuses to grant his Petition. Given such unseemly accusations and threats, this Court "should disregard or strike [his] brief." S. Ct. R. 24(6).

II.

THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN DISPUTE THAT WARRANT REVERSAL OF THE DISTRICT COURT'S DECISION

A. Given His Numerous Absences and Threatening E-mail Message, Cimarron Did Not Violate the ADA By Changing the Petitioner's Employment Status and Ultimately Terminating Him.

1. The Evidence Does Not Support Disability Discrimination.

The District Court determined that even if the Petitioner could prove a *prima facie* case, it was proper for Cimarron to change his employment status and ultimately terminate him given his numerous absences and

the threatening e-mail message. Cimarron had legitimate, non-discriminatory reasons for its actions and therefore did not discriminate against the Petitioner **"because of"** any disability. *See* 42 U.S.C. § 12112 and *Seaman v. CSPH, Inc.*, 179 F.3d 297, 300 (5th Cir. 1999) (emphasis added).

To be sure, the required direct proof or inference of unlawful intent under 42 U.S.C. § 12112 is missing because (1) the Petitioner has produced no evidence to support his conclusory allegations of anti-disability animus on the part of Cimarron; (2) Cimarron's intent in changing the Petitioner from salaried employment to hourly employment was a legitimate business response to his consistent inability to meet the weekly hourly requirements for salaried employees; and (3) Cimarron's discharge of the Petitioner was a legitimate business response to the December 17, 1998 e-mail message sent to Cimarron's and DynMcDermott's employees.

The Petitioner's rambling e-mail contained cryptic, ominous messages that were considered a potential threat to the safety of Cimarron's and DynMcDermott's employees. It was grounds for immediate termination, especially given the national security interests of the SPR and the DOE. Far from offering proof that Cimarron discharged him **because of** any disability, the Petitioner admitted he wrote and sent the e-mail.

The Petitioner was not terminated because of his alleged disability, but rather because he ran afoul of Cimarron's and DynMcDermott's legitimate expectation of appropriate workplace behavior. *See Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047, 1052 (5th Cir. 1998). Cimarron found the nature and content of the

Petitioner's c-mail to be a serious safety and security threat at the SPR and terminated him for this reason, not his alleged disability. *See Smith v. Leggett Wire Co.*, 220 F.3d 752 (6th Cir. 2000) (holding that an employee's death threat was a legitimate nondiscriminatory reason for firing him).

Furthermore, the ADA does not insulate an employee's emotional or violent outbursts attributable to an impairment. *Hamilton*, 136 F.3d at 1052. An employee who is fired because of an outburst at work directed at fellow employees has no ADA claim. Cimarron had instituted its policy against inappropriate workplace behavior with provisions for suspension and dismissal for severe offenses well before the Petitioner's misconduct, and as a Cimarron employee, he was aware that he would be held accountable for violating this policy. The bizarre e-mail that recipients perceived as a threat was Cimarron's reason for firing the appellant. Whether or not the Petitioner had a disability that limited his major life functions or was an otherwise qualified individual under the ADA, the Petitioner cannot hide behind the ADA and avoid accountability for his misconduct.

The Fifth Circuit has itself recently delineated the distinction between termination for misconduct and termination because of a disability. In *Seaman v. CSPH, Inc.*, an employee returned to work following a mental breakdown and notified his supervisor of an EEOC charge. *Seaman*, 179 F.3d at 301. In that same conversation, the employee yelled and screamed at his supervisor, and the latter fired the employee for insubordination. *Id.* The Fifth Circuit affirmed Summary Judgment for the employer, despite the close timing between a protected

activity and an adverse employment decision. *Id.* The Court stated that an employee "may not use the ADA as an aegis and thus avoid accountability for his own actions." *Id.*

Similarly, in this case, the Petitioner should be expected to conform to reasonable rules of conduct, regardless of his alleged disability. Such reasonable conduct would include presumably not misspending company time and disseminating cryptic, ominous e-mails that put fellow employees and managers in fear not only of their own safety but also of the security of a government project with significant economic and defense implications.

Moreover, Jay Rose both hired and fired the Petitioner. The Petitioner thus must present "substantial evidence" to overcome the "strong presumption" against discrimination existing by virtue of the "same actor inference." *See Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997), *cert. denied*, 525 U.S. 936 (1998) ("When the same person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to [him] an invidious motivation."). Indeed, the Petitioner has provided no "substantial evidence" – nor any evidence at all – to overcome this "strong presumption" against discrimination by Jay Rose (or Cimarron or DynMcDermott).

Finally, "it is the [employer's] perception of the employee's performance that is relevant, not [Petitioner's] subjective evaluation of [his] own relative performance." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1209 (10th Cir. 1999). *See Armstrong v. Turner Indus., Inc.*,

141 F.3d 554, 560 n.16 (5th Cir. 1998) (noting that the ADA protects employees from unlawfully motivated and not erroneous or arbitrary personnel decisions). Thus, despite the fact that the Petitioner believes that Cimarron and DynMcDermott over-reacted to his e-mail message (and absences), employers have wide latitude to exercise their business judgment and should not be second-guessed. *Id.*

Therefore, the District Court indeed correctly found that Cimarron (and DynMcDermott) had legitimate, non-discriminatory reasons for changing the Petitioner's employment status and for ultimately discharging him. The Petitioner came forward with absolutely no evidence challenging those reasons, so this Court should deny his Petition.

2. The Evidence Does Not Support Unlawful Retaliatory Discharge.

The District Court asserted that even if the Petitioner could establish a *prima facie* case, he could not prove that he would not have been terminated "but for" that protected disability. *See Seaman*, 179 F.3d at 1301. In other words, even if the presence of a protected disability is a "substantial element" in the decision to terminate an employee, no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected disability. *Long v. Eastfield College*, 88 F.3d 300, 305 (5th Cir. 1996).

The Petitioner was terminated for misconduct that threatened to compromise the safety and security of Cimarron's and DynMcDermott's employees as well as the SPR itself. The Petitioner has not and cannot set forth

controverting evidence establishing that this legitimate, non-discriminatory, and non-retaliatory reason was a pretext for unlawful retaliation. *See Elliott v. Group Med. & Surgical Services*, 714 F.2d 556, 566 (5th Cir. 1983).

Never did the Petitioner convey to Cimarron the specifics of his problems during his employment. The Petitioner contends that his employer was aware of his alleged disabilities because of the hospital discharge sheet that he allegedly faxed to Cimarron. However, this sheet contained absolutely no information whatsoever regarding any problems that the Petitioner was experiencing. Moreover, even the letter that the Petitioner claims he delivered to Jay Rose, his supervisor, on December 16, 1998 contained no specific information that the appellant was disabled.

Moreover, at that time, the Petitioner did not tell Jay Rose, or lead him to believe, that he was disabled; and the Petitioner admitted to EEOC investigators that there were no witnesses to this exchange with Jay Rose. Nor did Jay Rose ever receive any letter detailing any ADA disabilities.

Thus, Cimarron (and DynMcDermott) had no knowledge that the Petitioner had an alleged disability when it terminated his employment. Even if the Petitioner could prove that Cimarron knew he had been acting erratically or was seeking counseling, that knowledge is not alone sufficient to show that Cimarron either knew the Petitioner was disabled or that Cimarron regarded him as such. *See Crandall v. Paralyzed Veterans of America*, 146 F.3d 894, 898 (D.C. Cir. 1998) (holding that an offer of paid medical leave does not establish that the employer

regarded the employee as disabled); *Cody v. CIGNA Healthcare*, 139 F.3d 585, 599 (8th Cir. 1998) (holding that inducing an employee to take medical leave or to submit to a psychological evaluation before returning to work does not establish that an employer knew the employee was disabled); and *Sarko v. Penn-Del Dir. Co.*, 968 F. Supp. 1026, *aff'd*, 189 F.3d 464 (3d Cir. 1999) (holding that an employer's knowledge of an employee's depression and effects of medication was insufficient to establish that the employer regarded her as disabled).

Nonetheless, even assuming Cimarron knew that the Petitioner was disabled, the Petitioner cannot prove that "but for" his disability, he would not have been fired. The Petitioner sent a rambling, threatening e-mail to various Cimarron and DynMcDermott employees on December 17, 1998, the day after he supposedly gave Jay Rose his letter. That was grounds for termination in and of itself because it threatened to compromise the safety and security required for the SPR project. Policies regarding safety and security were set forth at Cimarron and DynMcDermott, and the Petitioner signed off on those policies when he began his employment, and thereby pledged to uphold those policies. He clearly chose not to uphold them.

The Petitioner has suggested in his Petition that this Court should find in his favor merely because there was a "close proximity" between the time he feels he conveyed to Jay Rose notice of an alleged disability and the time of his discharge. But that is not the law. In *Seaman*, an employee with a mental condition yelled and screamed at his supervisor and, in the same conversation, notified his supervisor of an EEOC charge. *Seaman*, 179 F.3d at 1301. The supervisor fired the employee for insubordination.

Id. The Fifth Circuit affirmed Summary Judgment for the employer and dismissed the retaliation claim, despite the "close proximity" between the protected activity and adverse employment decision. *Id.* Accordingly, "the mere fact that some adverse action is taken after an employee engages in some protected activity will not always be enough" to satisfy the Court. *Swanson v. General Servs. Admin.*, 110 F.3d 1180, 1188 n.3 (5th Cir. 1997). The federal law's "protection against retaliation does not permit EEO complainants to disregard work rules or job requirements." *Id.*

Cimarron has articulated a legitimate, non-discriminatory reason for firing the Petitioner: a rambling, ominous e-mail that threatened to compromise Cimarron's, DynMcDermott's, and the SPR's security and safety. Clearly, the Petitioner has been unable to show that he would not have been terminated "but for" his alleged disability, and thus the District Court's and Fifth Circuit's decisions should be upheld.

B. The Petitioner's Mental Impairment Does Not Render Him "Disabled" Under the ADA.

In addition to the fact that the evidence does not support either disability discrimination or unlawful retaliatory discharge, the Petitioner has offered no evidence at all to establish that he suffers from a disability protected by the ADA. *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 758 (5th Cir. 1996). The ADA confers a special meaning to the term "disability":

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such an individual; or
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

Hamilton, 136 F.3d at 1050 and 42 U.S.C. § 12102(2).

Because the Petitioner makes no claim other than that he falls under the first subsection of the disability definition, there is a three-step inquiry. The first question is whether his condition constitutes a physical impairment. *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998). The next step involves identifying the life activity upon which the Petitioner relies to determine whether it constitutes a major life activity under the ADA. *Id.* Third, tying the two statutory phrases together, the Court asks whether the impairment substantially limits the major life activity. *Id.*

The ADA does not define "substantially limits" or "major life activities," but the regulations promulgated by the EEOC under the ADA provide significant guidance. Whether an impairment is "substantially limiting" is determined in light of: 1) the nature and severity of the impairment; 2) its duration or expected duration; and 3) its permanent or expected permanent or long term impact. 29 C.F.R. § 1630.2(j). The EEOC regulations adopt the same definitions of "major life activities" used in the Rehabilitation Act. *Hamilton*, 136 F.3d at 1050. "Major life activities" means "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i).

In his deposition, the Petitioner asserted that, because of his mental condition, he has had several impairments. His judgment is impaired; his ability to interact with people is impaired; his memory is impaired; his energy level for interacting with people is impaired; his attention is impaired; and his ability to control his facial expressions is impaired.

Not one of his many concerns, however, is listed under the federal statute's definition of "major life activities." The Petitioner's impairments have simply not been severe enough to substantially limit any major life activities – like walking, talking, and working. In fact, he has held a full-time job as an analyst from March 1999 until the present with Interactive Systems International (now known as Energy Work Space). During that time, he has neither been disciplined, nor missed one day of work, nor suffered a decrease in pay, nor suffered any ill-effect in his personal life, because of any alleged disability. Clearly, he has been able to perform major life activities in spite of his alleged mental condition.

The Petitioner has seemed most concerned because he has not interacted well with people since the onset of his mental condition. But this is not enough to satisfy the disability definition. The First Circuit recently held that an employee's dysthymia, which affected his ability to get along with others, did not substantially impair a major life activity. *Soileau v. Guilford of Maine, Inc.*, 105 F.3d 12, 15 (1st Cir. 1997).

Moreover, the Petitioner in his Appellant Brief to the Fifth Circuit and his Petition to this Court suggested for the first time that he is disabled because his alleged

impairment has affected his speech (and heart) and thus limited a major life activity listed under 29 C.F.R. § 1630.2(i). At the appellate level, however, the Petitioner cannot conjure up new facts and theories that were not presented in the District Court because this Court, like the Fifth Circuit, must limit its review to those facts, exhibits, depositions, affidavits, and theories that were before the District Court when it entered Summary Judgment for Cimarron and DynMcDermott. *See Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667 (5th Cir. 1995); *Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300 (5th Cir. 1988); *Liberles v. County of Cook*, 709 F.2d 1122 (7th Cir. 1983); *Ramsey v. U.S.*, 463 F.2d 815 (D.C. Cir. 1972), *cert. denied*, 421 U.S. 913 (1975); and *Crompton-Richmond Co. v. Smith*, 392 F.2d 577 (3d Cir. 1967). *See also* C. Wright, A. Miller & M. Kane, 10A *Federal Practice and Procedure: Civil 2d* § 2716 (1998). **Significantly, the Circuits are uniform on this issue.**

But despite that, the Petitioner has not presented one shred of evidence establishing that his impairment has *substantially limited* his speech (or heart) to satisfy the ADA definition. To the contrary, the fact that he has performed impeccable work at his new job for almost two years clearly shows that there has been no substantial limitation of his speech or any other major life activity.

III.

THE DISTRICT COURT CORRECTLY DETERMINED THAT CIMARRON AND DYNMCDERMOTT COMPLIED FULLY THROUGHOUT DISCOVERY

A. The Petitioner Has Made Baseless and Improper Attacks on the Judges and Counsel for Respondents to Secure a Reversal of the District Court's Discovery Rulings.

The Petitioner's claim that Cimarron and DynMcDermott thwarted the discovery process is without merit. The Respondents answered fully and truthfully each of the Petitioner's numerous discovery requests. Also without merit is his contention that the District Court (and Fifth Circuit) incorrectly ruled against his discovery motions.

Many of the same discovery abuse claims that the Petitioner has raised before this Court were previously raised in motions before the District Court (and in his Appellant Brief to the Fifth Circuit) and denied as moot or as untimely. *See McCullough v. Lynaugh*, 835 F.2d 1126, 1126 (5th Cir. 1988); *Jourdan v. Jabe*, 951 F.2d 108 (6th Cir. 1991); and *King v. Atiyeh*, 814 F.2d 565 (9th Cir. 1987) (all holding that even pro se litigants like the Petitioner must adhere to basic procedural deadlines imposed by the Court or statutory rule). The Petitioner's sole argument for this Court now to revisit these issues and reverse the District Court's rulings is his dubious contention that counsel for Respondents, the District Court Judge, and the Fifth Circuit Judges all somehow committed "perjury and contempt." This is not the first time, however, that

the Petitioner has made such wild attacks. In his Appellant Brief to the Fifth Circuit, he charged that the District Court's discovery rulings were based on the fact that the "judge has some bias against" him and has "favoritism for" Cimarron and DynMcDermott.

Instead of directing this Court to some abuse of discretion made by the Judges below, the Petitioner has offered nothing more than *ad hominem* attacks (without one scintilla of evidence) to secure a reversal of various contested discovery and procedural rulings. *See McKethan v. Texas Farm Bureau*, 996 F.2d 734, 739 (5th Cir. 1993). The District Court (and the Fifth Circuit) correctly addressed and ruled on the Petitioner's discovery issues, and this Court has not been presented with one valid reason to overturn the District Court's rulings.

B. Rule 11 Sanctions Against the Petitioner Were Properly Issued by the District Court.

While the Petitioner has made unfounded accusations against the Respondents and the Courts regarding discovery, the Petitioner himself was sanctioned by the District Court pursuant to Rule 11 and ordered to pay $500 for discovery abuses. The District Court found that several of the Petitioner's discovery motions were based in neither fact nor law and caused Cimarron and DynMcDermott needless expense in the litigation. The $500 sanction was levied to deter repetition by the Petitioner. *See* Fed. R. Civ. P. 11(c)(2).

The Petitioner believes, however, that because the District Court did not levy monetary sanctions against Cimarron and DynMcDermott *for whatever reason (even*

though the Petitioner never asked for sanctions and Cimarron and DynMcDermott did nothing to warrant sanctions), the District Court somehow violated the Equal Protection Clause of the Fourteenth Amendment by treating the parties differently. The allegation is baseless.

The Equal Protection Clause of the Fourteenth Amendment is triggered when the government treats two classes of persons differently based on differences between the two classes, whether the differences regard race, gender, alienage, or otherwise. U.S. CONST. Amend. XIV. "The Clause announces a fundamental principle: the State must govern impartially." Therefore, "[o]nly when a governmental unit adopts a rule that has a special impact on less than all the persons subject to its jurisdiction does the question whether this principle is violated arise." *See New York City Transit Authority v. Beazer,* 440 U.S. 568, 587-88 (1979).

Here, however, the Petitioner has not suggested to this Court on which *classification* his Equal Protection claim is based, nor has he offered any proof of misconduct by the Courts or the Respondents. Moreover, the District Court did not even "adopt[ ] a rule" for purposes of the Equal Protection Clause when it ordered the appellant to pay $500. *See id.* Indeed, the Petitioner deserved his Rule 11 sanction, and there is no Equal Protection issue here.

Nor is there a Fifth Amendment issue. Courts often levy Rule 11 monetary sanctions against parties for frivolous conduct – even against pro se litigants like the Petitioner. *Doyle v. United States,* 817 F.2d 1235, 1237 (5th Cir. 1987), *cert. denied,* 484 U.S. 854 (1988). The $500

sanction did not violate the Due Process Clause of the Fifth Amendment because the Petitioner was afforded notice and an opportunity to be heard. U.S. CONST. Amend. V and *Connell v. Shoemaker*, 555 F.2d 483, 487 (5th Cir. 1977). The Petitioner even filed an opposition to Cimarron and DynMcDermott's Motion for Sanctions. Thus, his Fifth Amendment allegation is frivolous and should be denied by this Court.

CONCLUSION

This case is not "writ worthy." The Petitioner has failed to show that the District Court's determination is even arguably incorrect, much less in conflict with a decision of this Court, other Courts of Appeals, State Courts, or federal law. The Petitioner's *ad hominem* attacks to the contrary notwithstanding, the District Court Judge's decision is in full accord with controlling decisions of this Court and Courts of Appeals. Summary Judgment was properly entered in favor of Cimarron and DynMcDermott because they had legitimate, non-discriminatory reasons for discharging the Petitioner, given his threatening e-mail and numerous unauthorized absences. Moreover, the Petitioner is not even "disabled" under the ADA because he has not offered any proof of one major life activity that has been substantially limited by his alleged mental impairment. Likewise, the District Court correctly concluded that the Petitioner violated FRCP 11. And the Judge made no errors in his discovery rulings, nor has the Petitioner even clearly articulated

any such errors. For these reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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